

**In re: MANGOS PLUS, INC.  
PACA Docket No. D-98-0025.  
Order Denying Petition for Reconsideration filed September 7, 2000.**

**Petition for reconsideration – Flagrant and repeated violations – Publication of facts and circumstances.**

The Judicial Officer denied Respondent's Petition for Reconsideration. The Judicial Officer rejected Respondent's contention that the Chief ALJ made a finding that the United States Department of Agriculture, Agricultural Marketing Service, investigation was credible and reliable. The Judicial Officer stated that the Chief ALJ did not find the investigation was credible and reliable, but, instead, found that the investigator's testimony was reliable and sufficient to establish Complainant's *prima facie* case that during the period March 1996 through July 1998, Respondent failed to make full payment promptly to 30 sellers of the agreed purchase prices in the total amount of \$922,742.43 for 306 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate commerce, and that, at the time of the November 4, 1999, hearing, approximately \$228,000 of the \$922,742.43 debt was still outstanding. The Judicial Officer also rejected Respondent's contention that the June 15, 2000, Decision and Order was erroneously based on unreliable testimony and Respondent's failure to rebut unreliable testimony.

Kimberly D. Hart, for Complainant.  
Paul T. Gentile, New York, NY, for Respondent.  
Initial decision issued by James W. Hunt, Chief Administrative Law Judge.  
*Order issued by William G. Jenson, Judicial Officer.*

The Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on August 13, 1998. Complainant instituted this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.49) [hereinafter the PACA Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Complaint alleges that: (1) during the period March 1996 through July 1998, Mangos Plus, Inc. [hereinafter Respondent], failed to make full payment promptly to 30 sellers of the agreed purchase prices in the total amount of \$922,742.43 for 306 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate commerce (Compl. ¶ III); and (2) Respondent's failures to make full payment promptly of the agreed purchase prices for perishable agricultural commodities that it purchased, received, and accepted in interstate commerce constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶ IV). On December 3, 1998, Respondent filed an Answer denying the material allegations of the Complaint.

On November 4, 1999, Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] conducted an oral hearing in New York, New York.

Kimberly D. Hart, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Paul T. Gentile, Gentile & Dickler, New York, New York, represented Respondent. On January 14, 2000, Complainant filed Complainant's Proposed Findings of Fact, Conclusions, Order and Supporting Brief.

On March 14, 2000, the Chief ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the Chief ALJ: (1) found that, during the period March 1996 through June 1998, Respondent purchased, received, and accepted in interstate commerce, from 30 produce sellers, 306 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of \$922,742.43; (2) found that, at the time of the November 4, 1999, hearing, approximately \$228,000 of the \$922,742.43 debt was still outstanding; (3) concluded that Respondent's failures to make full payment promptly to produce sellers of the agreed purchase prices totaling \$942,742.43<sup>1</sup> constitute repeated and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (4) ordered publication of the facts and circumstances set forth in the Initial Decision and Order (Initial Decision and Order at 5).

On April 18, 2000, Respondent appealed to the Judicial Officer and petitioned to reopen the hearing. On May 30, 2000, Complainant filed Complainant's Response to Respondent's Appeal Petition. On June 1, 2000, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Respondent's petition to reopen the hearing and for a decision.

On June 15, 2000, I issued a Decision and Order: (1) denying Respondent's petition to reopen the hearing; (2) finding that, during the period March 1996 through July 1998, Respondent purchased, received, and accepted in interstate commerce, from 30 produce sellers, 306 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of \$922,742.43; (3) finding that, at the time of the November 4, 1999, hearing, approximately \$228,000 of the \$922,742.43 debt was still outstanding; (4) concluding that Respondent's failures to make full payment promptly to produce sellers of the agreed purchase prices totaling \$922,742.43 constitute repeated and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (5) ordering publication of the facts and circumstances set forth in the Decision and Order. *In re Mangos Plus, Inc.*, 59 Agric. Dec. \_\_\_\_, slip op. at 4, 10, 22 (June 15, 2000).

On July 31, 2000, Respondent filed Respondent's Petition for Reconsideration requesting reconsideration of the June 15, 2000, Decision and Order. On September 5, 2000, Complainant filed Complainant's Response to Respondent's

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<sup>1</sup>I infer, based on the Findings of Fact in the Initial Decision and Order, the Chief ALJ's conclusion that Respondent failed to pay agreed purchase prices totaling "\$942,742.43" is a typographical error and that the correct amount is "\$922,742.43."

Petition for Reconsideration. On September 6, 2000, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for reconsideration of the June 15, 2000, Decision and Order.

**APPLICABLE STATUTORY PROVISIONS AND REGULATIONS**

7 U.S.C.:

**TITLE 7—AGRICULTURE**

....

**CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES**

....

**§ 499b. Unfair conduct**

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—

....

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction[.] . . .

....

**§ 499h. Grounds for suspension or revocation of license**

**(a) Authority of Secretary**

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

7 U.S.C. §§ 499b(4), 499h(a).

7 C.F.R.:

## TITLE 7—AGRICULTURE

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### SUBCHAPTER B—MARKETING OF PERISHABLE AGRICULTURAL COMMODITIES

#### PART 46—REGULATIONS (OTHER THAN RULES OF PRACTICE) UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930

##### DEFINITIONS

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#### § 46.2 Definitions.

The terms defined in the first section of the Act shall have the same meaning as stated therein. Unless otherwise defined, the following terms whether used in the regulations, in the Act, or in the trade shall be construed as follows:

....

(aa) *Full payment promptly* is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. “Full payment promptly,” for the purpose of determining violations of the Act, means:

....

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted[.]

7 C.F.R. § 46.2(aa)(5).

Respondent raises two issues in Respondent's Petition for Reconsideration. First, Respondent contends the following statement in *In re Mangos Plus, Inc.*, 59 Agric. Dec. \_\_\_, slip op. at 11 (June 15, 2000), is error:

The Chief ALJ did not find that the United States Department of Agriculture, Agricultural Marketing Service, investigation was credible and reliable, as Respondent contends.

I disagree with Respondent's contention that the above-quoted statement is error. The Chief ALJ did not make a finding that the United States Department of Agriculture, Agricultural Marketing Service, investigation was credible and reliable in the Initial Decision and Order. Instead, the Chief ALJ addressed Respondent's contention that the investigation was not complete, as follows:

Respondent contended at the hearing that the investigator's testimony relating to Respondent's alleged failure to make full and prompt payments should not be admitted because the investigator did not make a complete inquiry about Respondent's alleged debt. (Tr. 68-69.) This contention is rejected. Complainant had the burden, in establishing a *prima facie* case, to come forth with evidence that Respondent was not in compliance with PACA's prompt payment requirement. The investigator's testimony on this point was reliable and sufficient to establish Complainant's case. Any evidence that Respondent had made prompt payments was as available, if not more so, to Respondent as it was to Complainant. Thus, once Complainant established a *prima facie* case of noncompliance, the burden was on Respondent to show that it had come into compliance by making payments to its creditors.

Initial Decision and Order at 2-3.

Thus, the Chief ALJ found the testimony of the United States Department of Agriculture, Agricultural Marketing Service, investigator, Ms. Shelby, reliable and sufficient to establish Complainant's *prima facie* case that, during the period March 1996 through July 1998, Respondent failed to make full payment promptly to 30 sellers of the agreed purchase prices in the total amount of \$922,742.43 for 306 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate commerce, and that, at the time of the November 4, 1999,

hearing, approximately \$228,000 of the \$922,742.43 debt was still outstanding. The Chief ALJ did not address the issue of whether the United States Department of Agriculture, Agricultural Marketing Service, investigation was credible and reliable.

Moreover, Respondent's focus on the extent of Ms. Shelby's investigation is misplaced. The issue in this proceeding is not whether Ms. Shelby should have conducted a more extensive investigation to determine whether Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), but rather the issue is whether Complainant proved by a preponderance of the evidence that Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).<sup>2</sup>

Complainant established a *prima facie* case. Respondent failed to rebut

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<sup>2</sup>Complainant, as the proponent of an order, has the burden of proof in this proceeding conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)). The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). It has long been held that the standard of proof in administrative disciplinary proceedings conducted under the PACA is preponderance of the evidence. *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 566-67 (1999); *In re Produce Distributors, Inc.* (Decision as to Irene T. Russo, d/b/a Jay Brokers), 58 Agric. Dec. 506, 534-35 (1999), *aff'd sub nom. Russo v. United States Dep't of Agric.*, 199 F.3d 1323 (Table), 1999 WL 1024094 (2<sup>d</sup> Cir. 1999); *In re JSG Trading Corp.* (Decision as to JSG Trading Corp., Gloria & Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile), 57 Agric. Dec. 640, 685-86 (1998), *remanded*, 176 F.3d 536 (D.C. Cir. 1999), *reprinted in* 58 Agric. Dec. 474 (1999), *final decision on remand*, 58 Agric. Dec. 1041 (1999), *appeal docketed*, No. 00-1011 (D.C. Cir. Jan. 13, 2000); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1893 (1997), *aff'd*, 178 F.3d 743 (5<sup>th</sup> Cir.), *cert. denied*, 120 S. Ct. 530 (1999); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 927 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2<sup>d</sup> Cir. 1998), *cert. denied*, 526 U.S. 1098 (1999); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1021 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1247 n.2 (1996), *aff'd*, 136 F.3d 89 (2<sup>d</sup> Cir. 1997); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1269 (1995), *aff'd*, 104 F.3d 139 (8<sup>th</sup> Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 522 U.S. 951 (1997); *In re John J. Conforti*, 54 Agric. Dec. 649, 659 (1995), *aff'd in part & rev'd in part*, 74 F.3d 838 (8<sup>th</sup> Cir. 1996), *cert. denied*, 519 U.S. 807 (1996); *In re DiCarlo Distributors, Inc.*, 53 Agric. Dec. 1680, 1704 (1994), *appeal withdrawn*, No. 94-4218 (2<sup>d</sup> Cir. June 21, 1995); *In re Boss Fruit & Vegetable, Inc.*, 53 Agric. Dec. 761, 792 (1994), *appeal dismissed*, No. 94-70408 (9<sup>th</sup> Cir. Nov. 17, 1994); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 617 (1993); *In re Lloyd Myers Co.*, 51 Agric. Dec. 747, 757 (1992), *aff'd*, 15 F.3d 1086, 1994 WL 20019 (9<sup>th</sup> Cir. 1994) (not to be cited as precedent under 9<sup>th</sup> Circuit Rule 36-3), *printed in* 53 Agric. Dec. 686 (1994); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 872-73 (1991), *aff'd per curiam*, 953 F.2d 639, 1992 WL 14586 (4<sup>th</sup> Cir.), *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169, 1191-92 (1990), *aff'd per curiam*, 945 F.2d 398, 1991 WL 193489 (4<sup>th</sup> Cir. 1991), *printed in* 50 Agric. Dec. 1839 (1991), *cert. denied*, 503 U.S. 970 (1992); *In re Valencia Trading Co.*, 48 Agric. Dec. 1083, 1091 (1989), *appeal dismissed*, No. 90-70144 (9<sup>th</sup> Cir. May 30, 1990); *In re McQueen Bros. Produce Co.*, 47 Agric. Dec. 1462, 1468 (1988), *aff'd*, 916 F.2d 715, 1990 WL 157022 (7<sup>th</sup> Cir. 1990); *In re Perfect Potato Packers, Inc.*, 45 Agric. Dec. 338, 352 (1986); *In re Tri-County Wholesale Produce Co.*, 45 Agric. Dec. 286, 304 n.16 (1986), *aff'd per curiam*, 822 F.2d 162 (D.C. Cir. 1987), *reprinted in* 46 Agric. Dec. 1105 (1987).

Complainant's evidence. Therefore, I agree with the Chief ALJ's conclusion that Complainant proved by a preponderance of the evidence that Respondent failed to make full payment promptly for perishable agricultural commodities as alleged in the Complaint.

Even if I found that Ms. Shelby could have engaged in a more thorough investigation to determine whether Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), that finding would not cause me to reverse the Chief ALJ because Complainant proved by a preponderance of the evidence that Respondent failed to make full payment promptly of the agreed purchase prices of perishable agricultural commodities, as alleged in the Complaint, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Second, Respondent contends Ms. Shelby failed to conduct an adequate, error-free investigation and hence Ms. Shelby was not credible (Respondent's Pet. for Recons. at 1-3). Respondent contends I erroneously based the June 15, 2000, Decision and Order on Ms. Shelby's unreliable testimony and Respondent's failure to rebut Ms. Shelby's testimony (Respondent's Pet. for Recons. at 3-4).

I fully addressed Respondent's contentions regarding Ms. Shelby's investigation, the evidence of Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and Respondent's failure to rebut the evidence of Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) in *In re Mangos Plus, Inc.*, 59 Agric. Dec. \_\_\_\_ (June 15, 2000). I have carefully reviewed my reasoning and conclusions regarding Ms. Shelby's investigation, the evidence of Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and Respondent's failure to rebut the evidence of Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) in the June 15, 2000, Decision and Order, and I find no error.

Finally, Respondent requests that I reconsider the June 15, 2000, Decision and Order "revoking the Respondent's PACA license" (Respondent's Pet. for Recons. at 1). The June 15, 2000, Decision and Order does not revoke Respondent's PACA license. Respondent's PACA license was terminated on April 8, 1999, for failure to pay the annual license renewal fee (Answer ¶ 2; CX 1 at 1, 16). Therefore, on June 15, 2000, when I issued the Decision and Order, Respondent did not have a PACA license which could be revoked, and I ordered publication of the facts and circumstances of Respondent's violations. *In re Mangos Plus, Inc.*, 59 Agric. Dec. \_\_\_\_, slip op. at 22 (June 15, 2000).

For the foregoing reasons and the reasons set forth in *In re Mangos Plus, Inc.*, 59 Agric. Dec. \_\_\_\_ (June 15, 2000), Respondent's Petition for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the

determination to grant or deny a timely-filed petition for reconsideration.<sup>3</sup> Respondent's Petition for Reconsideration was timely filed and automatically stayed the June 15, 2000, Decision and Order. Therefore, since Respondent's Petition for Reconsideration is denied, I hereby lift the automatic stay, and the Order in the Decision and Order filed June 15, 2000, is reinstated, with allowance for time passed.

For the foregoing reasons, the following Order should be issued.

### Order

The facts and circumstances set forth in the June 15, 2000, Decision and Order shall be published.

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<sup>3</sup>*In re David Tracy Bradshaw*, 59 Agric. Dec. \_\_\_, slip op. at 6 (Aug. 3, 2000) (Order denying Pet. for Recons.); *In re Kirby Produce Co.*, 58 Agric. Dec. 1032, 1040 (1999) (Order Denying Pet. for Recons.); *In re James E. Stephens*, 58 Agric. Dec. 201, 209 (1999) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 58 Agric. Dec. 619, 625 (1999) (Order Denying Pet. for Recons. on Remand); *In re Sweck's, Inc.*, 58 Agric. Dec. 222, 227 (1999) (Order Denying Pet. for Recons.); *In re Produce Distributors, Inc.*, 58 Agric. Dec. 535, 540-41 (1999) (Order Denying Pet. for Recons. as to Irene T. Russo, d/b/a Jay Brokers); *In re Judie Hansen*, 58 Agric. Dec. 369, 387 (1999) (Order Denying Pet. for Recons.); *In re Daniel E. Murray*, 58 Agric. Dec. 77, 83 (1999) (Order Denying Pet. for Recons.); *In re David M. Zimmerman*, 58 Agric. Dec. 336, 338-39 (1999) (Order Denying Pet. for Recons.); *In re C.C. Baird*, 57 Agric. Dec. 1284, 1299 (1998) (Order Denying in Part and Granting in Part Pet. for Recons.); *In re JSG Trading Corp.*, 57 Agric. Dec. 710, 729 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.); *In re Peter A. Lang*, 57 Agric. Dec. 91, 110 (1998) (Order Denying Pet. for Recons.); *In re Jerry Goetz*, 57 Agric. Dec. 426, 444 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.); *In re Allred's Produce*, 57 Agric. Dec. 799, 801-02 (1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. 791, 797 (1998) (Order Denying Pet. for Recons.); *In re Tolar Farms*, 57 Agric. Dec. 775, 789 (1998) (Order Denying Pet. for Recons.); *In re Samuel Zimmerman*, 56 Agric. Dec. 1458, 1467 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 275 (1997) (Order Denying Pet. for Recons.); *In re City of Orange*, 56 Agric. Dec. 370, 371 (1997) (Order Granting Request to Withdraw Pet. for Recons.); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 101 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).